Jonathan Freiman
Wiggin Dana, New Haven
jfreiman@wiggin.com

David Roth
Wiggin Dana, New Haven
droth@wiggin.com

US changes the rules for claims of Nazi-looted art against foreign sovereigns and foreign public museums

Recent years have seen a substantial increase in the number of lawsuits filed in the United States against museums over artworks that changed hands during the Nazi period, whether due to alleged Nazi looting or alleged sales under duress due to Nazi persecution. While many of these suits have been brought against US museums, plaintiffs have also brought numerous suits against foreign public museums and nations. At the moment, such suits are pending in the US against public museums in – or under the governments of – Spain, Hungary, Germany and the United Kingdom.[1]

But a recent decision, *de Csepel v Republic of Hungary*,[2] radically reduces plaintiffs' ability to sue foreign sovereigns for art allegedly expropriated by a foreign nation in a foreign nation. Moreover, it raises important questions about when and how plaintiffs can still sue foreign public museums in the US for art allegedly expropriated by a foreign nation in a foreign nation.

Plaintiffs base such lawsuits on the US Foreign Sovereign Immunities Act (FSIA),[3] which makes foreign states and their agencies and instrumentalities, including public museums, immune from suit unless a specific exception to immunity applies.[4] Plaintiffs suing foreign public museums over alleged Nazi-expropriated art nearly always rely on the 'expropriation exception' to sovereign immunity. That strips foreign sovereigns of immunity in any case:

> '(1) in which rights in property taken in violation of international law are in issue and (2)(a) that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or (b) that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.'[5]

US courts have interpreted this provision broadly in three respects. First, it applies retroactively to alleged expropriations that occurred before the FSIA was adopted in 1976.[6] Second, it allows suit not only against the sovereign that allegedly expropriated the art, but also against a public museum that later came to possess the art that a sovereign allegedly expropriated long ago.[7] Third, the expropriation exception's 'commercial nexus' requirement (parts (2)(a) and (b) above) – which requires that the foreign sovereign entity be engaged in commercial activity connected with the US – is satisfied when a museum engages in routine activities such as buying books from the US or shipping merchandise to US buyers.[8] To date, US courts have rejected the argument that a museum's US commercial activity must somehow relate to the disputed art.[9]

Since many major foreign public museums engage in at least some minimal commercial activity in the US, plaintiffs have felt free to sue essentially any foreign public museum over any alleged Nazi-expropriated art in its collection.[10] They ordinarily sue both the foreign public museum and the foreign government, assuming that if the requirements of the expropriation exception are met for the foreign public museum, they are also met for the foreign state itself.

De Csepel upended this assumption. It held that the FSIA's commercial-nexus requirement imposes separate standards for suing foreign states and the instrumentalities of foreign states.[11] Under (2)(b) above, a plaintiff can sue a foreign public museum possessing disputed art so long as the museum engages in commercial activity in the US. But to sue the foreign sovereign itself, *de Csepel* held, the plaintiff must satisfy (2)(a), which requires that either the art or property exchanged for the art (such as money) be present in the US in connection with the foreign state's own commercial activity in the US.

That is a much more rigorous requirement, one that plaintiffs will not be able to satisfy in most cases, where the art is not present in the US, but in a foreign museum. After *de Csepel*, we can expect to see suits over alleged Nazi-expropriated art brought only against the foreign public museum, not against the foreign sovereign itself.

De Csepel binds courts in the DC Circuit, where many suits over alleged Nazi-expropriated art are filed, but FSIA cases are also filed in other US jurisdictions, whose courts have not yet considered the arguments and issue decided in *de Csepel*. Nor has the US Supreme Court. While foreign-sovereign defendants will certainly raise *de Csepel* in cases filed elsewhere, it remains an open question for now whether other circuits will agree with the DC Circuit.

But in DC at least, and possibly more broadly, *de Csepel*'s restriction of such suits to foreign public museums, and not the foreign sovereigns themselves, will likely spawn two major developments.

First, if such suits survive motions to dismiss, plaintiffs will probably not be able to obtain 'discovery' from foreign sovereigns themselves using ordinary US discovery processes – that is, the pre-trial exchange of potentially relevant documents among parties and the taking of pre-trial depositions. US procedural rules permit the parties in a lawsuit to subpoena third parties (such as non-party foreign states) to submit to depositions or to produce documents for possible use in the US litigation.[12] But when a foreign state is immune from suit in the US, courts have held that it is also immune from third-party discovery.[13]

While plaintiffs might try to use other means to get discovery from foreign sovereigns, such as letters rogatory, those methods provide far narrower discovery – and far less burden to the foreign sovereign – than traditional US discovery rules.[14] Plaintiffs will still be able to seek documents from foreign public museums and seek to depose their relevant employees, but they probably won't be able to do so with foreign states, which after *de Csepel* will generally be immune from suit under the commercial-nexus requirement of the expropriation exception.

Second, *de Csepel* may invite litigation over whether the lax interpretation that US courts have previously given the FSIA's commercial-nexus requirement remains valid. As noted above, courts have consistently found the commercial-nexus requirement satisfied when foreign public museums engage in even inconsequential commercial activities in the US, such as selling books or admission tickets to US consumers over the internet – even when these activities are completely unrelated to the disputed art.

In essence, then, so long as a foreign public museum is engaged in *any* commercial activity in the US, the commercial-nexus requirement of the expropriation exception is satisfied as to *any* disputed artwork in its possession.

This result is difficult to square with recent US Supreme Court decisions on the doctrine of personal jurisdiction. Cases such as *Daimler AG v Bauman*[15] hold that the due process clause of the US constitution prohibits courts from exercising personal jurisdiction over foreign private corporations when the suit arises from events outside the US.

These cases would almost certainly prohibit a plaintiff from suing a *private* foreign museum in the US over art allegedly expropriated abroad and now on display in a foreign museum. The lax interpretation that courts have previously given the commercial-nexus requirement would thus allow suit in the US against a *public* foreign museum when suit against a *private* foreign museum would not be allowed. That would be very odd, particularly given the comity for foreign sovereigns – not foreign private entities – that US courts have long extended.[16]

Before *de Csepel*, foreign public museums had less reason to litigate whether this lax interpretation of the commercial-nexus requirement satisfies the US Constitution's due process requirements for personal jurisdiction. The DC Circuit has held that foreign states themselves cannot claim a lack of personal jurisdiction,[17] and nearly all cases alleging Nazi-expropriated art have been brought against both the foreign public museum and the associated sovereign state. That means that an argument that US courts could not constitutionally exercise personal jurisdiction over the museum would still leave the foreign state as a defendant.

But after *de Csepel*, foreign states will themselves almost always have immunity from suit over alleged Nazi-expropriated art on display in their public museums, leaving the foreign museum as the sole defendant. That gives foreign public museums a strong incentive to challenge the existing lax interpretation of the commercial-activity nexus. They might, for instance, argue that a foreign sovereign's agencies and instrumentalities (including public museums) are protected by the due process clause of the US constitution, which limits the personal jurisdiction that a court can exercise.

Before *de Csepel*, that issue has rarely been considered by US courts, though the DC Circuit has hinted that foreign agencies or instrumentalities may have such protection, at least when the foreign state does not exercise 'plenary control' over the entity.[18] If foreign public museums are protected by the due process clause, then the commercial-activity nexus of the FSIA's expropriation exception should be read to harmonise with the due process clause's limitations on personal jurisdiction. That would require courts to interpret the FSIA's commercial-activity nexus to provide personal jurisdiction over a foreign public museum only if the suit arises out of the museum's commercial activity in the US relating to the allegedly expropriated property.

The recent passage in the US of the Holocaust Expropriated Art Recovery Act of 2016[19] makes it more difficult for defendants to assert statute of limitations defenses. That means that US attorneys will likely file many more suits against foreign public museums over alleged Nazi-expropriated art in their collections. And since *de Csepel*'s holding means that foreign sovereigns will generally be immune from such suits, the foreign public museums will be the only defendants left standing. In the years to come, they and their opponents will press US courts to address the questions raised above.

[1] The authors currently represent a foreign sovereign and a foreign public museum in one such suit. This article reflects the authors' personal views, not necessarily the views of any past or current clients.
[2] 859 F.3d 1094 (D.C. Cir. 2017).
[3] *See* 28 U.S.C. §§ 1602–11.
[4] 28 U.S.C. § 1604.
[5] 28 U.S.C. § 1605(a)(3) (brackets added by the authors).
[6] *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
[7] *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028–32 (9th Cir. 2010) (allowing suit against Spanish museum over art allegedly expropriated by Nazis that, decades later, a private art collector sold to the museum).
[8] *See id.* at 1032.
[9] *See id.* at 1033.
[10] Because the commercial-nexus provision has been interpreted in this lax manner, litigation under the expropriation exception has focused primarily on the first part of this exception, namely whether the suit involves rights in property taken in violation of international law, a topic outside the scope of this article.
[11] *See* 859 F.3d at 1104–08.
[12] *See* Fed. R. Civ. P. 45(d).
[13] *See, e.g.*, *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007).
[14] *See, e.g.*, *Lantheus Medical Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 775–83 (S.D.N.Y. 2012) (discussing interplay of letters rogatory and FSIA).
[15] 134 S. Ct. 746 (2014) (holding that California court could not exercise general personal jurisdiction over German company for claims over Daimler's actions in Argentina); *see also Bristol-Meyers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1779–84 (2017) (holding that California court could not exercise case-linked personal jurisdiction over New York company for actions occurring outside of California).
[16] *See Hilton v. Guyot*, 159 U.S. 113 (1895).
[17] *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002).
[18] *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 301–02 (D.C. Cir. 2005).
[19] H.R. 6130, Pub. L. No. 114-308.